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No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1942

H. T. OVERSTREET, R. BRAZIE, AND L. L. GARVIN,
PETITIONERS
v.
THE NORTH SHORE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION

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OPINIONS BELOW

The opinion of the district court (R. 13–16) is reported in 43 F. Supp. 445. The opinion of the circuit court of appeals (R. 27–29) is reported in 128 F. (2d) 450.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 28, 1941 (R. 30). A petition for rehearing was filed on June 17, 1942 (R. 31–35), and was denied on June 30, 1942 (R. 36).

The petition for a writ of certiorari was filed on August 7, 1942, together with a motion for leave to proceed *in forma pauperis*. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Respondent owns and operates a toll road, including a drawbridge, lying entirely within the State of Florida. The road constitutes an integral part of an interstate highway system and is used by persons and vehicles traveling in interstate commerce. The drawbridge, which is part of the toll road, crosses a navigable stream used by vessels moving in interstate commerce. The question is whether employees of respondent who are engaged in maintaining and operating the toll road or the drawbridge are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On September 26, 1941, petitioners and eleven other employees filed a complaint under Section 16 (b) of the Act against respondent and its subsidiary, Bay Shore Water and Light Company. The complaint alleged that petitioners were engaged in interstate commerce and were therefore

entitled to the benefits of the Act, but had not been paid the required minimum wages or overtime compensation. (R. 1–10.) Respondent's motion to dismiss as to all fourteen plaintiffs (R. 11–12) was granted by the district court (R. 13–15), with leave to the eleven plaintiffs alleged to be engaged in the maintenance of a telephone line operated by Bay Shore Water and Light Company to file an amended complaint. Since petitioners were not thus engaged, a motion to have the order of dismissal made final as to them (R. 18) was granted by the district court (R. 19).[1] The order dismissing the complaint was affirmed by the circuit court of appeals (R. 27–30).

The relevant facts alleged in the complaint, as amended (R. 1–10, 16), which must be taken as true for purposes of the motion to dismiss, may be summarized as follows:

Respondent owns and operates a toll road and a drawbridge which is a part of the road (R. 2). The toll road connects United States Highway No. 17, an arterial highway extending from Jacksonville, Florida, to New York City and points north, with Fort George Island, which lies off the northern coast of Florida (R. 2). The island is separated from the mainland by the Intracoastal Waterway, which extends from Miami to New York; the toll road crosses the Waterway at

[1] Of the original fourteen plaintiffs, only petitioners appealed to the circuit court of appeals and respondent North Shore Corporation was the sole appellee (see R. 20, 21, 24).

Sisters' Creek by means of respondent's drawbridge (R. 2, 3).

The toll road, which is alleged to constitute "an integral part of the highway system of the United States," provides the only means of land communication between Fort George Island and the mainland and is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce (R. 2). Mail to and from other States as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road (R. 3–4).

Sisters' Creek, a part of the Intracoastal Waterway,[2] is a navigable stream used by freight-carrying vessels plying in interstate commerce between Florida and northern States as well as by pleasure craft moving to and from Florida (R. 3). "Many" vessels operating in such commerce pass through respondent's drawbridge daily (R. 5).

[2] Sisters' Creek is part of that section of the Intracoastal Waterway which extends south from Fernandina Harbor, Florida, to the St. John's River, a distance of 25 miles. It is an important highway of commerce; in 1939 it carried 268,876 tons of freight and 15,900 passengers; in 1940, the amount of freight carried increased to 287,407 tons. Annual Report of the Chief of Engineers, U. S. Army, Part 2, *Commercial Statistics—Water-borne Commerce of the United States* (1941), p. 603. Three-fourths of the freight carried in 1940 (219,614 tons, or 76 per cent) was "through traffic," i. e., shipments in interstate commerce. *Id.*, p. 604. Commercial vessels made more than 5,000 trips over this portion of the Waterway during 1940. *Id.*, p. 605.

Each of the petitioners was employed by respondent in connection with the operation of the toll road and the drawbridge. Overstreet was the operator of the drawbridge, raising the bridge to permit the passage of boats through Sisters' Creek and lowering it for the resumption of traffic over the road (R. 5); Brazle was engaged in maintenance and repair work on the road and the bridge, his services being "necessary to the maintenance and use of the said toll road in interstate commerce" (R. 16); Garvin sold and collected toll tickets "from vehicles using said toll road in interstate commerce" and his duties "were necessary to the use and maintenance of the said road in interstate commerce" (*id.*). Petitioners received neither the minimum wages nor the overtime compensation prescribed by Sections 6 and 7 of the Act (R. 5–6, 8–10).

ARGUMENT

1. The case presents a question of considerable importance in the application and administration of the Fair Labor Standards Act. The decision creates uncertainty concerning the status of employees who are not engaged in production but whose work furthers and facilitates interstate commerce. The interpretation of the phrase "engaged in commerce" (Sections 6, 7, *infra*, p. 11) adopted by the court below represents an unduly narrow reading of this exercise of federal power,

and as applied to the Fair Labor Standards Act would exclude from the coverage of the Act many thousands of employees who are entitled to its benefits.

2. Upon the facts alleged in the complaint (*supra*, pp. 3–4), petitioners are engaged either in the maintenance or operation of instrumentalities of commerce or are engaged in both the maintenance and operation of such instrumentalities. The toll road and the drawbridge carry interstate vehicles and goods; operation of the drawbridge, in turn, is further a function of interstate commerce since it also opens the path, when raised, for interstate water commerce. Petitioners' maintenance and operation of the road and the bridge, accordingly, establish them as engaged "in" interstate commerce under principles long since established by this Court in cases arising out of the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65). *Pedersen* v. *Delaware, Lack. & West. R. R.*, 229 U. S. 146, 151; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, 14–15; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 573; *Philadelphia, B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, 103–104; *Philadelphia & Read. Ry. Co.* v. *DiDonato*, 256 U. S. 327, 329–331. An employment to perform "work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employ-

ment in such commerce . . . ." *Kinzell* v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133.[1] Plainly, neither the water-borne commerce on the Intracoastal Waterway nor the interstate transportation by automobile and truck along the toll road could proceed without performance of petitioners' duties. And neither the text nor the legislative history of the Fair Labor Standards Act affords any hint of congressional intention to depart from these established principles by contracting the clause "in commerce" so as to include only employees who transport goods across state lines or otherwise directly participate in state-to-state movement. Indeed, it would be illogical to conceive that employees who bear a "necessary" relation to production for commerce—a process once removed from actual interstate commerce—would be covered by the Act while those who bear an

[1] Subsequent to the decisions cited, The Federal Employers' Liability Act was amended to provide that "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Act of August 11, 1939, c. 685, 53 Stat. 1404. This incorporated into the statute, in effect, its prior judicial construction. Compare *New York Central R. R. Co.* v. *Carr*, 238 U. S. 260, 263–264. For the text of the Act prior to amendment see 223 U. S., pp. 6–9.

identical relation to the primary process of interstate commerce itself would not be covered.[1]

The conclusion that the clause "in commerce" as used in the Fair Labor Standards Act is not to be restricted in the manner indicated by the court below is affirmed by the decisions of this and other courts. In *Overnight Motor Transp. Co.* v. *Missel*, No. 939, last Term, decided June 8, 1942, a rate clerk employed by an interstate motor carrier was held to be engaged in commerce. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. The same result has been reached as to maintenance employees, watchmen, and office and clerical workers by the lower federal and state courts. *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D.

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[1] No basis for such a restrictive intent can be found to lie in the absence of a statutory definition of the phrase "engaged in commerce" in terms of "necessary" processes, although such a definition was included in respect of "production of goods for commerce", the alternative basis for coverage. Section 3 (j). *Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942. At the time of the passage of the Act, principles relating to the permissible scope of regulation of productive processes were in flux (cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251) and elaboration of congressional definition in respect of the production aspect was, accordingly, appropriate. In contrast, the clause "in commerce" had acquired an established meaning and through repeated judicial construction had become recognized as including employee activities which facilitated interstate transportation and communication. Since the phrase had thus acquired these connotations, no occasion arose for elaboration.

Calif.); *Stoike* v. *First National Bank of the City of New York*, 5 Wage Hour Rept. 560 (N. Y. App. Div. 1942); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.); *Mortenson* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 (S. D. Iowa); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. 1941); *Fleming* v. *Kull*, 4 Wage Hour Rept. 411 (E. D. Tex. 1941); *Spinner* v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144 (Ohio 1942); *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (N. D. Ala. 1941); *Walling* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320 (E. D. Ark. 1942). But cf. *Cochran* v. *Florida National Bldg. Corp.*, 5 Wage Hour Rept. 576 (S. D. Fla. 1942); *Johnson* v. *Downtown Development Co.*, 5 Wage Hour Rept. 462 (N. D. Tex. 1942); *Tate* v. *Empire Bldg. Corp.*, 5 Wage Hour Rept. 475 (E. D. Tenn. 1942).

The reasons given by the court below in support of its position are contrary to settled principles. In holding that *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, and *Detroit Bridge Co.* v. *Corporation Tax Board*, 294 U. S. 83, both of which were concerned only with the permissible area of state taxation, were "decisive" of the contention that petitioners were entitled to the benefits of the Fair Labor Standards Act (R. 28–29), the court assumed that the areas of valid state taxation and of federal regulation under the com-

merce clause are mutually exclusive. But see *Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 46; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466. And in holding that if respondent is not engaged in interstate commerce its employees cannot be so engaged (R. 29), the court departed from the now settled principle that the duties of the employee and not the business of the employer is determinative of coverage under the Act.[*] *Kirschbaum* v. *Walling*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IRVING J. LEVY,
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SEPTEMBER 1942.

[*] It is submitted that in any event the court's premise was in error. It seems plain that since respondent was in the business of maintaining and operating the road as a toll road, for which it collected fees, respondent was in fact engaged in interstate commerce.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—* * *

* * * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * *

* * * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employees or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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